

PAMELA BRENNAN et al, No C-04-2676 VRW
Plaintiffs,
v ORDER
CONCORD EFS, INC et al,
Defendants.

ORDER

In this putative class action, plaintiffs assert that defendants -- banks and other entities involved in the processing of withdrawals from automated teller machines (ATMs) in the "Star" ATM network ("Star") -- have engaged in horizontal price fixing declared illegal by section 1 of the Sherman Antitrust Act, 15 USC § 1. Plaintiffs argue that defendants' conduct is condemned per se; they disclaim any intention of proceeding on a rule of reason theory. Several defendants move to dismiss the complaint (or for judgment on the pleadings) on the ground that Star is a procompetitive cooperative joint venture subject only to rule of reason analysis. Doc ##26, 29, 42. Other defendants move to

1 dismiss on the ground that the complaint does not sufficiently
2 allege their involvement in setting the terms of Star's operations.
3 Doc ##17, 33.

4
5 I

6 "On a motion to dismiss, all well-pleaded allegations of
7 material fact are taken as true and construed in a light most
8 favorable to the non-moving party." Wyler Summit Partnership v
9 Turner Broadcasting System, Inc, 135 F3d 658, 661 (9th Cir 1998)
10 (citing Parks School of Business, Inc v Symington, 51 F3d 1480,
11 1484 (9th Cir 1995)). Accordingly, what follows is drawn from
12 plaintiffs' complaint (Doc #1), taking its allegations as true.

13 As almost anyone who has an ATM card knows, withdrawals
14 can be made from an account at one bank -- the bank that issues the
15 ATM card (the "issuing bank") -- using an ATM owned by a third
16 party (the "ATM owner"). Only banks can issue ATM cards, but banks
17 and non-banks alike can operate ATMs. Transactions in which the
18 issuing bank is not the ATM owner -- known as "foreign ATM
19 transactions" -- are mediated by an ATM network that connects the
20 ATM to the issuing bank. One such network (the subject of this
21 suit) is Star, which is owned by defendant Concord EFS, Inc
22 ("Concord EFS"); Concord EFS is a wholly owned subsidiary of First
23 Data Corp ("First Data"). Compl (Doc #1) ¶8. Transactions in
24 which the issuing bank is also the ATM owner -- known as "on us"
25 transactions, see Doc #26 at 6 n4 -- do not involve the ATM
26 network; such transactions are not the subject of this suit.

27 Another thing that ATM cardholders know is that while "on
28 us" transactions are typically free, foreign ATM transactions

1 involve fees. First, there is the "ATM surcharge," which is
2 typically displayed on the ATM screen and collected by the ATM
3 owner as part of the cardholder's withdrawal. The ATM surcharge
4 ranges from zero (offered as an promotional enticement by some ATM
5 operators) to \$3.00 or more. Second, there is the "foreign ATM
6 fee," which is assessed by the issuing bank and typically appears
7 on the cardholder's bank statement as a fee. The foreign ATM fee
8 ranges from zero (offered by banks that own few ATMs and are at a
9 competitive disadvantage relative to banks that own many ATMs) to
10 about \$2.00 (currently the fee charged by the large banks that are
11 defendants here). Third, there is a "switch fee" on the order of
12 \$0.05 paid by the issuing bank to the ATM network (Star in this
13 case) for the network's services in mediating a foreign ATM
14 transaction. Fourth, there is an "interchange fee" of \$0.45 or
15 \$0.55 paid by the issuing bank to the ATM owner for use of the
16 foreign ATM. See Compl (Doc #1) ¶1 (defining fees); ¶2 & Fig A
17 (diagraming typical foreign ATM transaction); ¶52 (describing
18 current foreign ATM fees); ¶57 (describing interchange fees).

19 This suit concerns the interchange fee, which is fixed by
20 Star and applies to all foreign ATM transactions mediated by the
21 network. Presently, the interchange fee is \$0.45 for on-bank-
22 premise cash withdrawals and \$0.55 for off-bank-premise cash
23 withdrawals. Id ¶57. The interchange fee is supposedly passed on
24 to plaintiffs -- ATM cardholders who have paid (or expect to pay)
25 foreign ATM fees for transactions mediated by Star -- in the form
26 of artificially inflated foreign ATM fees.

27 The complaint is somewhat fuzzy on Star's corporate
28 constitution, but at a minimum, see id ¶8, Star is controlled

1 directly or indirectly via its board of directors by a host of
2 large banks that are defendants in this case: Bank of America Corp
3 ("B of A"); Bank One Corp; Bank One NA; J P Morgan Chase & Co
4 ("JPMorgan Chase"); Citibank (West) FSB ("Citibank"); SunTrust
5 Banks, Inc ("SunTrust"); Wachovia Corp ("Wachovia"); Wells Fargo &
6 Co; Wells Fargo Bank, NA; Servus Financial Corp ("Servus")
7 (collectively, the "defendant banks"). The whirlwind of bank
8 mergers and acquisitions in the last five years makes for quite a
9 tangle of rights and liabilities, but the complaint clearly states
10 that each of the defendant banks either (1) is entitled to appoint
11 outside directors to the Star board of directors, or (2) controls
12 or succeeded to the rights and liabilities of an entity that was so
13 entitled. Id ¶¶9-14. (The one exception is Wachovia Bank NA,
14 which appears in the complaint's caption but is mentioned nowhere
15 in the complaint.) Through this control structure the defendant
16 banks "have caused Star to continue to impose [i]nterchange
17 [f]ees," from which the defendant banks benefit, both because they
18 charge foreign ATM fees and because the defendant banks receive
19 interchange fees to the extent they own ATMs. Id ¶61.

20 Although the defendant banks control Star, an ATM network
21 derives value from the participation of a large number of issuing
22 banks and ATM owners -- indeed, the complaint effectively concedes
23 that Star is a joint venture that benefits consumers and fosters
24 competition among issuing banks by allowing smaller banks that
25 cannot afford to deploy a large number of ATMs nonetheless to
26 compete with larger banks that do own many ATMs. Id ¶49. As such,
27 Star accepts as members issuing banks and ATM owners other than the
28 defendant banks. Id ¶50. Although bound by Star's network

1 policies, those issuing banks and ATM owners have "virtually no
2 role" in setting network policies; but the bank defendants "have a
3 significant role in establishing network policies." Id. On
4 information and belief, plaintiffs allege that "some or all of the
5 [b]ank [d]efendants" serve on an advisory committee "with the
6 authority to veto or propose operating rules for the network and
7 external [i]nterchange rates and fees payable between or passed to
8 network participants." Id. ¶58. Although plaintiffs implicitly
9 concede that some horizontal restraints are necessary to create
10 Star and thereby benefit consumers, plaintiffs contend that
11 "[i]mposing fixed [i]nterchange [f]ees is unnecessary to Star
12 operations." Id. ¶64.

13 Plaintiffs seek both damages (for past payment of
14 putatively inflated foreign ATM fees) and an injunction (against
15 future fixing of interchange fees). Plaintiffs propose to proceed
16 on behalf of four classes: two classes of California residents
17 (one seeking retrospective damages relief; the other seeking
18 injunctive relief), and two classes of non-California residents
19 (seeking similar relief). Combined, those classes would roughly
20 comprise all persons and business entities who (1) opened a bank
21 account with a bank defendant and (2) either (a) paid a foreign ATM
22 fee directly to a bank defendant or its affiliate or (b) currently
23 have a bank account with a bank defendant.

24 25 II

26 Several dispositive motions are now before the court.
27 Some are motions to dismiss pursuant to FRCP 12(b)(6) for failure
28 to state a claim upon which relief can be granted; some are motions

1 for judgment on the pleadings pursuant to FRCP 12(c). The
2 pertinent legal standard is the same. In re World War II Era
3 Japanese Forced Labor Litigation, 114 F Supp 2d 939, 944 (ND Cal
4 2000) (citing Enron Oil Trading & Transp Co v Walbrook Insurance
5 Co, 132 F3d 526, 529 (9th Cir 1997)), aff'd sub nom Deutsch v
6 Turner Corp, 324 F3d 692 (9th Cir 2003). Accordingly, the court
7 will treat all pending motions under FRCP 12(b)(6) and refer to
8 them as "motions to dismiss."

9 FRCP 12(b)(6) motions to dismiss essentially "test
10 whether a cognizable claim has been pleaded in the complaint."
11 Scheid v Fanny Farmer Candy Shops, Inc, 859 F2d 434, 436 (6th Cir
12 1988). FRCP 8(a), which states that a plaintiff's pleadings must
13 contain "a short and plain statement of the claim showing that the
14 pleader is entitled to relief," provides the standard for judging
15 whether such a cognizable claim exists. Lee v City of Los Angeles,
16 250 F3d 668, 679 (9th Cir 2001). This standard is a liberal one
17 that does not require a plaintiff to set forth all the factual
18 details of the claim; rather, all that the standard requires is
19 that a plaintiff give the defendant fair notice of the claim and
20 the grounds for making that claim. Leatherman v Tarrant County
21 Narcotics Intell & Coord Unit, 507 US 163, 168 (1993) (citing
22 Conley v Gibson, 355 US 41, 47 (1957)). To this end, a plaintiff's
23 complaint should set forth "either direct or inferential
24 allegations with respect to all the material elements of the
25 claim". Wittstock v Van Sile, Inc, 330 F3d 899, 902 (6th Cir
26 2003).

27 Under Rule 12(b)(6), a complaint "should not be dismissed
28 for failure to state a claim unless it appears beyond doubt that

1 the plaintiff can prove no set of facts in support of [its] claim
2 which would entitle [it] to relief." Hughes v Rowe, 449 US 5, 9
3 (1980) (citing Haines v Kerner, 404 US 519, 520 (1972)). See also
4 Conley, 355 US at 45-46. All material allegations in the complaint
5 must be taken as true and construed in the light most favorable to
6 plaintiff. See In re Silicon Graphics Inc Sec Litig, 183 F3d 970,
7 980 n10 (9th Cir 1999).

8 The court will first take up the bank defendants' motions
9 to dismiss on the ground that plaintiffs do not state a claim for a
10 per se violation of the antitrust laws. Then the court will turn
11 to the individual motions by Bank One Corp and JPMorgan Chase and
12 by First Data to dismiss for failure adequately to allege those
13 entities' involvement in setting Star's terms.

14
15 A

16 Citibank and Suntrust (the "Citibank movants") (Doc #26)
17 and B of A, Bank One Corp, Bank One NA and JPMorgan Chase (the "B
18 of A movants") (Doc #29) move to dismiss the complaint for failure
19 to state a per se antitrust claim. Although the bank defendants'
20 memoranda in connection with these motions run several dozen pages,
21 the nub of their argument is a simple syllogism: (1) Restraints in
22 furtherance of procompetitive cooperative joint ventures are
23 subject to rule of reason analysis, see, e g, Broadcast Music, Inc
24 v Columbia Broadcasting System, Inc, 441 US 1 (1979) ("BMI");
25 National Collegiate Athletic Association v Board of Regents, 468 US
26 85 (1984) ("NCAA"); (2) fixing the interchange fee is necessary to
27 the existence of Star, the joint venture at issue; therefore (3)
28 the fixing of the interchange fee should be analyzed under the rule

1 of reason.

2 Defendants' logic is impeccable, but the syllogism's
3 minor premise -- that fixing the interchange fee is necessary -- is
4 an inherently factual contention that cannot properly be resolved
5 on a motion to dismiss. In fact, plaintiffs have pled exactly the
6 opposite: "Imposing fixed [i]nterchange [f]ees is unnecessary to
7 Star operations. Interchange [f]ees neither create a product that
8 would not exist absent the fees nor enhance or promote competition
9 in the ATM market." Compl (Doc #1) ¶64. This is a factual
10 contention and it is axiomatic that the court must accept it as
11 true for purposes of the present motions. It is a plausible
12 inference from plaintiffs' complaint, for example, that modern
13 information technology could inexpensively automate competitive
14 price setting among even the hundreds or thousands of Star members,
15 making fixed interchange fees unnecessary to Star's existence. If
16 plaintiffs are right, then horizontal price fixing is horizontal
17 price fixing -- and it is beside the point that prices were fixed
18 in the context of an otherwise-lawful joint venture.

19 The court must note at the outset that plaintiffs'
20 challenge to the "fixed interchange fee" is susceptible of two
21 interpretations, only one of which is the proper subject of a per
22 se challenge. On the one hand, plaintiffs might seek to replace
23 the \$0.45 or \$0.55 fee with a fee of \$0.00 -- a "zero fee," so to
24 speak. This interpretation is suggested by the historical account
25 of interchange fees described in ¶¶49-60 of the complaint and the
26 conclusion in ¶62 that "the widespread adoption of [s]urcharges has
27 eliminated any purported justification for [i]nterchange [f]ees."
28 Under the "zero fee" argument, plaintiffs would contend that

1 although interchange fees were necessary back when ATM owners had
2 no other source of remuneration (that is, when surcharges were
3 banned), interchange fees can now be set at zero because ATM owners
4 can fend for themselves through surcharges. But to say that
5 interchange fees should be abolished (the same thing as "set at
6 zero") is to concede that setting the interchange fee with
7 certainty at some level is necessary to Star's existence -- which
8 is fatal to plaintiffs' per se claim. (Indeed, such an argument is
9 not an antitrust argument at all, for it amounts to a dispute over
10 prices and competition law is not concerned with setting a proper
11 price.) By contrast to the "zero fee" argument, plaintiffs do have
12 a viable per se argument if what they seek is to permit competitive
13 (e g, bilateral) negotiation of interchange fees among issuing
14 banks and ATM owners. The court proceeds -- as must plaintiffs to
15 maintain a per se case -- on the premise that a challenge to the
16 "fixed interchange fee" is a challenge not to the fee's existence
17 but to the fixed nature of the fee; that is, plaintiffs challenge
18 the fixing of the interchange fee.

19 On that understanding, recent Ninth Circuit authority is
20 squarely on plaintiffs' side. In Freeman v San Diego Ass'n of
21 Realtors, 322 F3d 1133 (9th Cir 2003) (Kozinski, J), the Ninth
22 Circuit considered a joint venture among several realtor
23 associations to create a centralized multiple listing service (MLS)
24 database. Access to the centralized MLS database, maintained by
25 Sandicor, was sold to individual realtors, with the realtor
26 associations providing billing services and technical support.
27 Sandicor charged realtors \$44 per month; the realtor associations
28 agreed that Sandicor would pay \$22.50 per month to each of them for

1 each subscriber they supported. Id at 1146. The plaintiffs --
2 realtors who contended they were overpaying for MLS services --
3 brought suit to challenge the fixed \$22.50 price for support
4 services. The Ninth Circuit held that the realtor associations'
5 agreement to fix support services pricing was illegal per se under
6 section 1 of the Sherman Act. Id at 1150-54. Indeed, the Ninth
7 Circuit explicitly rejected the argument that "the inherent
8 cooperative aspects of the MLS as a joint venture warrant more
9 deferential review," explaining that "any elements of novelty and
10 cooperation in the MLS are irrelevant to whether support fees are
11 fixed or set competitively." Id at 1151. Put succinctly:

12 Antitrust law doesn't frown on all joint
13 ventures among competitors -- far from it. If
14 a joint venture benefits consumers and doesn't
15 violate any applicable per se rules, it will
16 often be perfectly legal. The decision to
combine MLS databses fits comfortably within
this category. The further decision to fix
support fees does not.

17 Id at 1157 (citation omitted).

18 The same point is made in Dagher v Saudi Refining, Inc.,
19 369 F3d 1108 (9th Cir 2004), petition for cert pending. Dagher
20 concerned a joint venture between the oil refining and marketing
21 companies Texaco and Shell; the joint venture included an agreement
22 to fix prices in the retail market for gasoline produced under the
23 joint venture. The Ninth Circuit summarized the question presented
24 and its holding:

25 The question we confront in this case * * * is
26 not whether two companies engaged in run-of-
the-mill price fixing. Instead, the defendants
27 have asked us to find an exception to the per
se prohibition on price-fixing where two
28 entities have established a joint venture that
unifies their production and marketing

1 function, yet continue to sell their formerly
2 competitive products as distinct brands. In
3 doing so, the companies fixed the prices of
4 these two brands of gasoline, Texaco and Shell,
5 by agreeing ex ante to charge the same price
6 for each. We think the exception the
7 defendants seek is inconsistent with the
8 Sherman Act as it has been understood to date.

9 Id at 1116. And again, the Ninth Circuit explained that "joint
10 venture" is not a mantra to escape per se analysis:

11 It is not the case * * * that the mere
12 existence of a bona fide joint venture means
13 that participating companies may use the
14 enterprises to do anything they please with
15 full immunity from per se analysis under § 1,
16 including price fixing. * * * [T]he issue with
17 respect to legitimate joint ventures is whether
18 the price fixing is "naked" (in which case the
19 restraint is illegal) or "ancillary" (in which
20 case it is not).

21 Id at 1118 (citing Herbert Hovenkamp, XI Antitrust Law ¶1908 (1998)
22 ("[A] restraint is not saved from the 'naked' classification simply
23 because it is included in some larger joint venture arrangement
24 that is clearly efficient.")).

25 The core question identified in Dagher -- whether a
26 restriction such as fixing the interchange fee is a "naked"
27 restraint or an "ancillary" restraint -- is quintessentially one of
28 fact, and one that plaintiffs have pled in their favor in the
29 complaint. If the restraint proves to be naked, it is subject to
30 per se analysis and plaintiffs have stated a claim. Against these
31 elementary propositions, the bank defendants offer several
32 arguments, none of which persuades.

33 The B of A movants try to beg the question. See, e g,
34 Doc #29 at 7:22-8:3 ("In the context of an arrangement like this,
35 in which some form of agreement among the parties is necessary to

1 permit the system to operate, it is well established * * * that the
2 per se doctrine does not apply."); id at 9:5 (referring to the
3 fixed interchange fee as "one of the many rules that have been
4 adopted of necessity to make the network work"); id at 11:1-2 ("The
5 challenged interchange fee is therefore plainly ancillary to a
6 lawful joint enterprise * * *"). These conclusory statements are,
7 of course, insufficient to sustain a motion to dismiss.

8 The Citibank movants do somewhat better in arguing that
9 "[w]ithout [the] advance certainty of obligation [that comes from a
10 fixed interchange fee], no bank would agree to pay out money to
11 individuals with whom it has no depository relationship" and that
12 "there is no way that each member bank [or ATM owner, presumably,]
13 possibly could reach agreement with each and every other bank about
14 the terms on which they will make their machines available to each
15 other." Doc #26 4:3-5, 11-13. The Citibank movants also make a
16 game theoretical argument that in the absence of a collective
17 promise by the issuing banks to pay a minimum interchange fee to
18 ATM owners, individually self-interested issuing banks would set
19 foreign ATM fees so high that ATM owners would be unable to collect
20 a surcharge large enough to entice them to enter the market -- and
21 there would be no ATM service. See Doc #115 at 6-7. Whatever the
22 merits of these arguments, they are intrinsically factual, contrary
23 to plaintiffs' pleading and inappropriate for resolution at the
24 motion to dismiss stage.

25 The bank defendants also rely on several cases to support
26 their position, but they are distinguishable. For example, while
27 BMI supports the bank defendants in stating that "[j]oint ventures
28 and other cooperative arrangements are * * * not usually unlawful,"

1 the BMI Court immediately added the caveat "at least not as price-
2 fixing schemes where the agreement on price is necessary to market
3 the product at all." 441 US at 23. Moreover, the "blanket
4 license" to musical compositions offered by BMI was upheld as
5 lawful by the Court not at the pleadings stage, but after an eight-
6 week trial on the merits; it was this trial that established that
7 "[a] middleman with a blanket license was an obvious necessity if
8 the thousands of individual negotiations, a virtual impossibility,
9 were to be avoided." Id at 20.

10 Likewise, National Bankcard Corp v Visa USA, Inc, 779 F2d
11 592 (11th Cir 1986) ("NaBanco"), is distinguishable. There, the
12 Eleventh Circuit based its rejection of a per se analysis on the
13 fact that the interchange fee between banks operating the Visa
14 credit card payment system was a "'necessary' term without which
15 the system would not function." Id at 602. And again, that
16 conclusion rested on the district court's finding of fact following
17 a nine-week bench trial that the interchange fee was "an agreement
18 on the terms of interchange necessary for VISA to market its
19 product and be an effective competitor." National Bankcard Corp v
20 Visa USA, Inc, 596 F Supp 1231, 1253 (SD Fla 1984).

21 NCAA is not especially helpful to the bank defendants in
22 that it too followed an "extended trial," 468 US at 88, and
23 ultimately held the restraints in question to violate the Sherman
24 Act (albeit under a rule of reason analysis). NCAA supports the
25 bank defendants in one respect, however: NCAA treated the question
26 whether "the agreement on price is necessary to market the product
27 at all" as germane to an efficiencies defense under a rule of
28 reason analysis, see id at 113-15 (citing BMI), and (apparently)

1 irrelevant to the threshold issue whether per se or rule of reason
2 analysis governed the case, see *id* at 100-04. This analytical
3 reordering -- rarely if ever seen outside the context of sports
4 leagues -- appears to be the product of the Court's pronouncement
5 (again, following a lengthy trial) that "what is critical is that
6 this case involves an industry in which horizontal restraints on
7 competition are essential if the product is to be available at
8 all." *Id* at 101. But a sports league, while appearing to be a
9 joint venture of competitors (and on the field, they are), is
10 really only one firm and cases involving the leagues may be
11 essentially sui generis. See, e g, Gary R Roberts, Sports Leagues
12 and the Sherman Act: The Use and Abuse of Section 1 to Regulate
13 Restraints on Intraleague Rivalry, 32 UCLA L Rev 219 (1984). For
14 present purposes, it suffices to say that the ATM industry may be
15 as exceptional as the televised college sports industry, but that
16 is subject to proof by defendants.

17 The one case cited by the bank defendants that is both
18 legally and procedurally on point is the decision by Judge White of
19 this court in Reyn's Pasta Bella LLC v Visa USA, Inc, 259 F Supp 2d
20 992 (ND Cal 2003). In Reyn's, the court determined on a motion to
21 dismiss that a horizontal price fixing challenge to the fixing of
22 credit card interchange fees should be analyzed under the rule of
23 reason. Three reasons persuade this court not to follow Judge
24 White's opinion in this case: First, the Reyn's court had the
25 benefit of NaBanco's decision on a very similar (if not identical)
26 set of credit card interchange fees; this court does not have
27 analogous appellate authority with respect to the ATM interchange
28 fee in this case. (Though similar in name, the interchange fees in

1 the two industries are structurally rather different.) While
2 perhaps not unflinchingly faithful to the Eleventh Circuit's
3 analytical path in NaBanco and distinguishing that decision in
4 certain respects, the Reyn's decision pragmatically took the same
5 path as NaBanco in analyzing the credit card interchange fee under
6 the rule of reason. Second, Reyn's did not have the benefit of
7 Dagher and Freeman: Dagher was decided over a year after Reyn's,
8 and although Freeman had issued only weeks before Reyn's, Reyn's
9 does not cite Freeman, which may not have been brought to Judge
10 White's attention. Third, Reyn's quotes the canonical language
11 from BMI -- that the rule of reason applies "where the agreement on
12 price is necessary to market the product at all" -- yet the
13 analysis in Reyn's focuses entirely on whether the Visa payment
14 system is a joint venture, and it ignores the "necessary" language
15 of BMI. See 259 F Supp 2d at 1000.

16 In some respects, a better analogy to the case that
17 plaintiffs have pled is a case not yet mentioned: United States v
18 Topco Associates, 405 US 596 (1971). Topco was "a cooperative
19 association of approximately 25 small and medium-sized regional
20 supermarket chains." Id at 598. The cooperative procured and
21 distributed to its members a variety of food and nonfood items,
22 branded under various names owned by Topco. Id. As a buying
23 cooperative, Topco's "very existence * * * improved the competitive
24 potential of Topco members with respect to other large and powerful
25 chains." Id at 600. Topco was, in more recent parlance, a
26 cooperative procompetitive joint venture. But the darker side of
27 Topco -- its bylaws required horizontal territorial division among
28 the association's members -- led the Court to condemn it as a per

1 se violation of the Sherman Act. Id at 608.

2 The parallels between this case and Topco are
3 crystallized by Chief Justice Burger's dissent in Topco, in which
4 he stressed the interbrand competition fostered by Topco's
5 existence:

6 [W]e have here an agreement among several small
7 grocery chains to join in a cooperative
8 endeavor that, in my view, has an
9 unquestionably lawful principal purpose; in
10 pursuit of that purpose they have mutually
11 agreed to certain minimal ancillary restraints
12 that are fully reasonable in view of the
13 principal purpose * * *.

14 Id at 613 (Burger, CJ, dissenting). But of course, the Chief
15 Justice's view did not prevail. The law is this: Horizontal
16 restraints in the context of a procompetitive joint venture remain
17 unlawful per se unless they are necessary to (or, in certain
18 formulations, "reasonably ancillary to") the achievement of the
19 joint venture's procompetitive benefits.

20 The bank defendants offer various reformulations of their
21 basic argument, but the court is constrained to reject them at this
22 stage. Accordingly, the bank defendants' motions to dismiss (Doc
23 ##26, 29) are DENIED.

24 B

25 Bank One Corp and JPMorgan Chase move to dismiss the
26 complaint against them pursuant to FRCP 12(b)(6) on the ground that
27 it fails adequately to allege their participation in the alleged
28 conspiracy. Doc #17. Bank One Corp and JPMorgan Chase contend
that they are "nonoperating holding corporations," id at 1:22, and
that the complaint does not explain how they participated in the

1 alleged conspiracy or are liable for the actions of a subsidiary,
2 Bank One NA. As alleged in the complaint, the holding company
3 structure is this: JPMorgan Chase was created on July 1, 2004, by
4 the holding company merger between J P Morgan Chase & Co and Bank
5 One Corp. Bank One NA, which was a wholly owned subsidiary of Bank
6 One Corp at the time of the July 2004 merger, had previously
7 acquired Bank One of Arizona NA, which was entitled to appoint
8 outside directors to Star's board. Compl (Doc #1) ¶10. In short,
9 the complaint alleges that at present Bank One NA is a subsidiary
10 of JPMorgan Chase; it is unclear whether Bank One Corp continues to
11 exist following the July 2004 holding company merger. There is no
12 dispute -- at least at this stage -- that Bank One NA has successor
13 liability for Bank One of Arizona NA's actions.

14 Bank One Corp and JPMorgan Chase make two arguments, both
15 of which the court would have to accept to grant their motion to
16 dismiss. One argument goes to vicarious liability, the other to
17 conspiracy liability. As to vicarious liability, they contend that
18 the complaint does not adequately plead alter ego liability on Bank
19 One Corp's part for actions of Bank One NA; and that in turn,
20 JPMorgan Chase cannot be liable because Bank One Corp had no
21 liability to which JPMorgan Chase could have succeeded in the
22 holding company merger. As for liability for conspiracy, Bank One
23 Corp and JPMorgan Chase argue that the complaint's pleading format
24 -- specifically, grouping them with the other bank defendants and
25 alleging that the group in general conspired to fix interchange
26 fees -- is inadequate under FRCP 8, which sets a minimum threshold
27 of defendant-by-defendant specificity that a plaintiff must meet.

28 These arguments are convincing. The allegations of the

1 complaint regarding both the vicarious liability and conspiracy
2 theories are simply legal conclusions without supporting facts.
3 For example, plaintiffs allege that "Bank One [Corp] exercised such
4 dominion and control over Bank One, NA and Bank One Arizona that it
5 is liable according to the law for the acts of Bank One, NA and
6 Bank One Arizona." Compl (Doc #1) ¶10. See, e g, Neilson v Union
7 Bank of California, NA, 290 F Supp 2d 1101, 1116 (CD Cal 2003)
8 ("Conclusory allegations of 'alter ego' status are insufficient to
9 state a claim. Rather, a plaintiff must allege specifically both
10 of the elements of alter ego liability, as well as facts supporting
11 each.").

12 With respect to the conspiracy theory of liability, Bank
13 One Corp and JPMorgan Chase are quite correct that the complaint
14 lumps them in with the other bank defendants for purposes of
15 pleading the conspiracy. They are equally correct that the
16 allegations of the complaint doing the work under FRCP 8 of
17 pleading the conspiracy are not the generalized allegations of, for
18 example, ¶61 ("The [b]ank [d]efendants * * * have caused Star to
19 continue to impose [i]nterchange [f]ees * * * ."), but rather the
20 particularized allegations of ¶¶9-14 that state how each bank,
21 individually, exerted control over Star's rulemaking.
22 Consequently, there are no allegations in the complaint
23 specifically connecting Bank One Corp and JPMorgan Chase to the
24 alleged conspiracy that controlled Star. Cf In re Sagent
25 Technology, Inc, Derivative Litigation, 278 F Supp 2d 1079, 1094
26 (ND Cal 2003) ("While [FRCP] 8 requires only that the a pleading
27 set forth a short and plain statement of the claim showing that the
28 pleader is entitled to relief, the underlying requirement is that a

1 pleading give fair notice of the claim being asserted and the
2 grounds upon which it rests. A complaint that lumps together
3 thirteen individual defendants, where only three of the individuals
4 was alleged to have been present for the entire period of the
5 events alleged in the complaint, fails to give fair notice of the
6 claim to those defendants." (citation and quotation marks
7 omitted)).

8 In response to this, plaintiffs argue principally that
9 Bank One Corp and JPMorgan Chase are conspirators in this case for
10 an entirely different reason -- to wit, because they exerted
11 control over Visa USA Inc and Visa International Corp
12 (collectively, "Visa") and Mastercard International Inc
13 ("Mastercard"). Id ¶¶17-20. Visa and Mastercard own,
14 respectively, Plus and Cirrus, the two worldwide ATM networks. Id
15 ¶¶18-19. Plaintiffs contend -- and the complaint is far from clear
16 on the causation or conspiracy in this -- that action by these two
17 networks precipitated the adoption of ATM surcharges in all ATM
18 networks. Id ¶¶54-55. This in turn rendered fixed interchange
19 fees unnecessary. Id ¶62. Plaintiffs' tale about the involvement
20 of Bank One Corp and JPMorgan Chase in all this is not totally
21 improbable. But the complaint is so poorly developed in this
22 particular respect that it does not give fair notice under FRCP 8
23 to Bank One Corp and JPMorgan Chase (or the court, for that matter)
24 of the role they are alleged to have played in the conspiracy.
25 Indeed, the complaint is ambiguous on just what the scope of the
26 alleged conspiracy was: The complaint concentrates largely on the
27 decisionmaking surrounding Star, yet Visa and Mastercard -- avowed
28 competitors of Star, no less -- are announced as coconspirators,

1 see Compl (Doc #1) ¶¶17-18.

2 Accordingly, Bank One Corp and JPMorgan Chase's motion to
3 dismiss is GRANTED. The defects in the complaint against these
4 entities could possibly be resolved by an amended pleading;
5 accordingly, plaintiffs are given leave to amend their complaint
6 against Bank One Corp and JPMorgan Chase. See United States v
7 Smithkline Beecham Clinic Labs, 245 F3d 1048, 1052 (9th Cir 2001).
8 On the other hand, the parties may wish to defer resolution of the
9 liability of Bank One Corp and JPMorgan Chase by entering into a
10 tolling agreement pending the outcome of other issues. The choice
11 is, in the first instance, plaintiff's and then, possibly, Bank One
12 Corp's and JPMorgan Chase's.

13
14 C

15 First Data moves to dismiss the complaint on the ground
16 that it fails to allege First Data's involvement in the claimed
17 conspiracy. Doc #33. First Data proceeds from a simple premise:
18 The complaint states that "Concord [EFS] was acquired by First Data
19 * * *, the largest US credit card processor, and is now a wholly-
20 owned subsidiary of First Data," Compl (Doc #1) ¶8, but beyond
21 this, the complaint says nothing specific about First Data.
22 Plainly, the allegation quoted above is insufficient to state a
23 claim for alter ego liability on First Data's part for acts taken
24 by its subsidiary Concord EFS. And although the complaint
25 repeatedly refers to "the defendants" or "the bank defendants" in
26 the aggregate -- groups that include First Data, even though it is
27 not a bank -- there are no allegations in the complaint specific to
28 First Data that suggest how it could have taken the actions

1 ascribed to "the defendants" or "the bank defendants." The court
2 agrees with First Data that the complaint does not give it fair
3 notice of the claims against it.

4 Plaintiffs' response largely ignores their complaint.
5 They assert that "First Data has now owned Star for over a year,"
6 Doc #109 at 16:10-11, but of course, that is not what the complaint
7 alleges: The complaint asserts that First Data owns a corporation
8 that in turn owns Star. Plaintiffs rely on material outside the
9 complaint to suggest that First Data acts as Star's agent. Id at
10 18-19. They ask the court to take judicial notice of several
11 hundred pages of SEC filings made by First Data, Doc #111, and they
12 parse this material at length in their filings, Doc #109 at 5-10.

13 Perhaps under certain circumstances, SEC filings are the
14 proper subject of judicial notice; the court expresses no view on
15 this question. Judicial notice at the pleadings stage is properly
16 invoked to fill in a small gap in an otherwise complete portrait
17 painted by the complaint. But here, the canvass is missing as well
18 as the image: Plaintiffs would defeat a motion to dismiss by
19 piling a ream of SEC filings (literally) onto one half-sentence in
20 their complaint. This is not proper at the pleadings stage -- not
21 as a matter of procedure and certainly not as a matter of good
22 practice. Plaintiffs are manifestly in command of vast knowledge
23 about First Data's activities; the length of their opposition
24 paper, which runs to the very limits of Civ L R 7-4(b), more than
25 amply illustrates that. Distilling the material in plaintiffs'
26 opposition paper into an amended complaint should be trivial for
27 plaintiffs, will likely give fair notice to First Data and will
28 surely be a boon to the court.

Accordingly, First Data's motion to dismiss (Doc #33) is GRANTED, and plaintiffs are given leave to file an amended complaint to amplify their allegations against First Data.

III

Plaintiffs have filed a paper styled "plaintiffs' submission regarding scheduling and arbitration." Doc #120. Defendants have filed a paper in response. Doc #125. Plaintiffs seek an order directing defendants (1) to state by a date certain their intentions to file a motion to compel arbitration and (2) if they so intend, to file such a motion by a date certain. The court is not entirely satisfied that it has the authority to force the issue, and even if the court were so empowered, the issue seems better resolved by litigating equitable defenses such as waiver and estoppel in the context of an actual motion to compel arbitration - - if and when such a motion should be presented to the court.

IV

In sum, the court DENIES the motions to dismiss the complaint for failure to state a per se antitrust claim (Doc ##26, 29); GRANTS First Data's motion to dismiss (Doc #33); and GRANTS Bank One Corp and JPMorgan Chase's motion to dismiss (Doc #17). Plaintiffs are given leave to file an amended complaint. The parties may stipulate to a pleading schedule in accordance with their respective positions, but shall appear on July 13, 2005, at 10:00am for a hearing on any motions filed and for a scheduling conference, at which the parties should be prepared to address a discovery plan and any outstanding pleading issues. As previously

1 set at the January 26, 2005, case management conference,
2 defendants' initial disclosure are due 60 days from the date of
3 this order.

4
5 IT IS SO ORDERED.

6 
7

8 VAUGHN R WALKER
9 United States District Chief Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28